Supreme Court, U.S.
FILED
SEP 15 1986
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No. 85-2112

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1985

LODI TRUCK SERVICE, INC.,
*Appellant,*

VS.

DIVISION OF LABOR STANDARDS ENFORCEMENT,
DEPARTMENT OF INDUSTRIAL RELATIONS,
STATE OF CALIFORNIA,
*Appellee.*

**On Appeal from the Superior Court of the State of California, County of San Joaquin, Appellate Department**

## REPLY IN OPPOSITION TO MOTIONS TO DISMISS OR AFFIRM

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DEPARTMENT OF INDUSTRIAL RELATIONS,
STATE OF CALIFORNIA,
*Appellee.*

**On Appeal from the Superior Court of the State of California, County of San Joaquin, Appellate Department**

## REPLY IN OPPOSITION TO MOTIONS TO DISMISS OR AFFIRM

Appellant, Lodi Truck Service, Inc., pursuant to Rule 16 of the Rules of the Supreme Court of the United States hereby replies to appellee's motions to dismiss or affirm the decision of the California Superior Court.

## INTENT OF CONGRESS TO GRANT EXCLUSIVE JURISDICTION TO A SINGLE FEDERAL AGENCY OVER HOURS OF SERVICE OF INTERSTATE MOTOR CARRIER SAFETY EMPLOYEES

Appellee in both motions to dismiss or affirm[1] offers the argument that Congress has not evidenced a manifest intent to preempt the field, i.e. grant to the United States Department of Transportation ("D.O.T.") exclusive jurisdiction over the work hours of safety of operations employees of interstate motor carriers regulated by the Interstate Commerce Commission ("I.C.C."). The motions contain no discussion of the pertinent or governing statutes, the Interstate Commerce Act and the Fair Labor Standards Act ("FLSA"), or the intent of Congress and the language by which the federal legislature expressed its wishes, policy and purpose of the legislation. The reason for this omission is apparent—the legislative intent and history is manifestly contrary to the position of the appellee. Absence of challenges by the respective states or local governments to the federal agency's exclusive powers over the hours of these employees over the past 50 years should make the current assumption over such hours by a state very suspect. The Motor Carrier Act of 1935 ("MCA"), pursuant to which the I.C.C. was granted jurisdiction over the hours of service of safety of operation employees of interstate motor carriers and the FLSA enacted in 1938, which affirmed Congress' intent to grant to the I.C.C., and now the D.O.T. exclusive jurisdiction over these hours, have remained substantially unchanged since they became law. Legislative histories of these acts reflect a clear and manifest Congressional intent that other federal, state, municipal and other local governmental agencies shall not have concurrent control with the D.O.T. over the service hours of these employees.

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[1] Motions to dismiss or affirm were filed on behalf of the Division of Labor Standards Enforcement, the Department of Industrial Relations, the State of California, by the Attorney General of the State of California and by the Department of Labor Standards enforcement.

In a directly related and leading case, the United States Supreme Court was required to determine the intent of Congress with respect to the relationship of the power of the I.C.C. over the hours of service of safety of operation employees of interstate motor carriers and the exception or preclusion of control of the same hours by other governmental agencies. In *United States v. Amercian Trucking Association,* 310 U.S. 534, 60 S.Ct. 1059 (1940), it was declared that the function of the court in interpreting statutes is to "construe the language so as to give effect to the intent of Congress." "There is, of course," it stated, "no more persuasive evidence of the purpose of the statute than the words by which the legislature undertook to give expression to its wishes. . . . When that plain meaning has led to absurd or futile results, however, this court has looked beyond the words to the purpose of the Act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole', this court has followed that purpose rather than the literal words. . . . Emphasis should be laid, too, upon the necessity for appraisal of the purposes as a whole of Congress in analyzing the meaning of clauses or sections of general acts." The Supreme Court further stated that the general practice or policy of Congress has been consistent in legislating for qualifications and hours of transportation employees and referred to the statutes enacted pursuant to this policy: "The Hours of Service Act proposes restrictions on the hours of labor of employees 'actually engaged in or connected with the movement of any train.' The Seamen's Act limits employee regulations under it to members of ships' crews. The Civil Aeronautics Authority has authority over the hours of service of employees 'in the interest of safety' ". (Id. at 1063, 1064)

The 1907 railroad employees' Hours of Service Act (34 Stat. 1415), the Seamen's Act (38 Stat. 1164, 1169, 1170-1184), enacted in 1915, the Civil Aeronautics Act of 1938 (52 Stat. 1007), and the Motor Carrier Act of 1935 (49 Stat. 543) are pieces of the general scheme of Congress to permit only individual federal agencies to establish the limits of the hours of work for these transportation employees. The federal legislature, in recognition of this long established policy, included Subsections 13(b)(1)(2)(3) and (6) (29 U.S.C. 213(b)(1)(2)(3) and (6))

in the FLSA to assure protection for the exclusivity of these powers granted to the agencies. The appellee, however, argues that the exclusive power was not the intent of Congress in enacting these laws and that no restraint or inhibition is placed upon the state's power to control the work hours of such transportation workers. The effect of this position, if sustained, would be for any federal, state, municipal, or other government or their agencies to assume joint or concurrent control over the hours of these employees except; however, the U.S. Department of Labor, which is precluded from doing so by virtue of Subsection 13(b)(1)(2)(3) and (6) of the FLSA. Appellee's argument is manifestly without merit and would produce an absurd result. The absurdity of this interpretation is made readily apparent by the fact that if appellee's motion is granted, there will be literally hundreds and perhaps thousands of governments and their agencies in the 50 states that will be vested with the power to regulate the hours of the safety employees of interstate motor carriers. When the Motor Carrier Act was passed in 1935, 40 states had regulatory measures relating to the hours of service of motor carrier employees. *United States v. American Trucking Association,* 60 S.Ct. at 1065. With this knowledge, Congress wisely reserved the power to establish hours for the safety employees of interstate motor carriers in the single governmental agency and avoided what would otherwise be a chaotic and unreasonable situation.

The two statutes, MCA and FLSA, are unquestionably among the most pervasive and comprehensive regulatory schemes ever enacted by the federal legislature. *United States v. Darby,* 312 U.S. 100, 61 S.Ct. 451 (1940); *Kirschbaum v. Walling,* 316 U.S. 517, 62 S.Ct. 1116 (1942); *Castle v. Hayes Freight Lines, Inc.,* 348 U.S. 61, 75 S.Ct. 191 (1954); *Mitchell v. H.B. Zachry,* 362 U.S. 310, 80 S.Ct. 739 (1960); *Chicago & North Western Transp. v. Kalo Brick & Tile Co.,* 450 U.S. 333, 101 S.Ct. 1124 (1981). Both laws have long expository histories as Congress had before it annually between 1926 and 1935 legislation to regulate interstate motor carriers and the multiple attempts that were made to establish federal wage and hour laws graphically reveal the intent and purpose of the FLSA. 79 Cong.Rec. 5650, 12204; *Schecter v. United States,* 295 U.S. 495, 55 S.Ct. 837 (1935).

When considering Senate Bill 1629, enacted as the Motor Carrier Act of 1935, there were long debates in both the House and Senate concerning granting control to the I.C.C. over the qualifications and maximum hours of service of motor carrier employees. 79 Cong.Rec. 5651, 5652, 12204-12206, 12209, 12225, (1935). It was suggested to the committees of both houses to write maximum or specific hours for the motor carrier safety employees which was rejected in favor of granting the I.C.C. discretionary authority with flexibility to "take into consideration all peculiarities and emergencies that exist in the motor carrier industry." 79 Cong.Rec. 5652, 12205, 12225 (1935). The appellee, however, seeks to impose maximum or specific work hour limitations for these employees directly contrary to the wishes and decision of Congress. Senator Wheeler, sponsor of Senate Bill 1629, stated concerning the proposal to limit the work hours "We left it as the Commission suggested, giving them power to make the investigation and, if and when they found it necessary, to put into effect such rules and regulations as they might deem necessary." 79 Cong.Rec. 5652 (1935).

Section 204(a)(1) of the Interstate Commerce Act (49 U.S.C. § 304(a)(1)) enacted in 1935 declared it to be the duty of the Commission to regulate interstate motor carriers and to establish reasonable requirements with respect to "qualifications and maximum hours of service of employees and safety of operation and equipment". Through enactment of the D.O.T. Act and recodification, the D.O.T. is now authorized to prescribe: "(1) Qualifications and maximum hours of service of employees of, and safety of operation and equipment of, a motor carrier."(29 U.S.C. § 3102(b))

In 1938, the FLSA became law through which Congress adopted a comprehensive scheme for regulating the wages and hours of all employees that were directly or indirectly involved in interstate commerce. The effect of this legislation was to preempt all state and local governmental controls over wages and hours of all employees with limited exceptions. Justice Owen Roberts, in discussing the effects of the landmark case, *United States v. Darby*, 312 U.S. 100, 61 S.Ct. 451 (1940), which upheld the constitutionality of the FLSA, stated:

> "Of course, the effect of sustaining the Act was to place the whole matter of wages and hours of persons employed

throughout the United States, with slight exceptions, under a single federal regulatory scheme and in this way, completely to supersede state exercise of the power in this field." Roberts, the Court and the Constitution, 56, 58 (1951)

In *Mitchell v. H.B. Zachry Co.*, 362 U.S. 310, 320, 80 S.Ct. 739, 745 (1960) Mr. Justice Frankfurter stated that the [FLSA] has "displaced state regulation throughout the fartherest reaches of the channels of interstate commerce". The extent of this reach was demonstrated in an early and leading case involving the scope of the law, *Kirschbaum v. Walling*, 316 U.S. 517, 62 S.Ct. 1116 (1942), in which the court concluded that maintenance, operating and janitorial employees of a six-story loft building, whose tenants manufactured ladies' garments that were shipped in interstate commerce, were covered by the FLSA.

During the FLSA Congressional debates, there were many members of both the Senate and House that strongly urged that the wage and hour problem be met through a method of state control implemented and aided by the federal government. However, this was rejected by Congress, thereby preempting the jurisdiction of states over this subject matter. 81 Cong.Rec. 2445-2448, 2720-2725 (1937). Appellee seeks to change this decision of Congress.

In drafting the FLSA legislation, significant consideration was given to adopting a policy that would be consistent with other regulatory laws. Senator Black, chairman of the committee responsible for drafting Senate Bill 2475, *repeatedly* stated that the Committee believed that "it would certainly be unwise to have hours of service regulated by two governmental agencies." 81 Cong.Rec. 7875 (1937) Pursuant to this consistent Congressional policy, amendments were proposed and adopted specifically exempting motor carrier, railroad, maritime, and aviation employees from Section 207 (overtime hours) of the FLSA. (29 U.S.C. 213(b)(1)(2)(3)(6)) It is to be noted that Section 13(b)(1) (29 U.S.C. 213(b)(1)) of the FLSA exempts any safety of operation employee with respect to whom the Secretary of Transportation has the "power" to establish qualifications and maximum hours of service. It does not and Congress purposely did not intend that this authority read, as urged by the appellee, with "respect to whom the Secretary of Transportation *has* established maximum hours of service."

In *United States v. American Trucking Association*, supra, the United States Supreme Court considered the relationship of the Section 18 (29 U.S.C. 218) "savings" clause of the FLSA and the Section 13(b)(1) exemption of the work hours of motor carrier employees. Section 18(a), in part, states:

> "(a) No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter *or a maximum workweek lower than the maximum workweek established under this chapter*. . . ." (Emphasis added)

It is evident that the language of this provision of the FLSA allows federal, state and local governments and agencies to regulate hours of work which they would otherwise be preempted from doing. However, this permissive authority only applies to employees whose hours or work weeks are established by the FLSA, not those excepted therefrom. Maximum work weeks are not established for motor carrier safety employees under the FLSA. The language adopted by Congress in Section 18(a) manifestly precludes any second governmental agency from assuming jurisdiction over the hours of such employees. See also *Southland Gasoline Co. v. Bayley*, 319 U.S. 44, 48, 49, 63 S.Ct. 917 (1943), *Weaver v. Pittsburgh S.S. Co.*, 153 F.2d 597, 599 (1946). In determining the intent of Congress with respect to the relationship between Section 18(a) and Subsection 13(b)(1) of the FLSA (29 U.S.C. 18(a), 13(b)(1)), the United States Supreme Court in *United States v. American Trucking Association*, supra, 60 S.Ct. at 1062, stated:

> "Section 7 of this Act (FLSA) limits the workweek at the normal rate of pay of all employees subject to its terms and Section 18 makes the maximum hours of the Fair Labor Standards Act *subject to further reduction by applicable federal or state law or municipal ordinances. There were certain employees excepted, however, from these regulations by Section 13(b). It reads as follows:*
>
> *'Sec. 13 [213]. ***(b) The provisions of section 7 [207] shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pur-*

*suant to the provisions of Section 204 [304 of Title 49] of the Motor Carrier Act, 1935,***.* * (Emphasis Added)

Appellee argues that Congress intended to permit an overlapping of the enforcement of maximum hours of service for safety purposes and, at the same time, require compliance with increased rates of pay for work performed in excess of those hours. However, the United States Supreme Court held that: "Such overlapping, however, has not been authorized by Congress and it remains for us to give full effect to the safety program to which Congress has attached primary importance, even to the corresponding exclusion by Congress of certain employees from the benefits of the compulsory overtime pay provisions of the Fair Labor Standards Act." *Levinson v. Spector Motor Service,* 330 U.S. 649, 67 S.Ct. 931 (1947).

## THE CLEAR INTENT OF CONGRESS WAS TO ENACT A REGULATORY SCHEME THAT COMPLETELY OCCUPIED THE FIELD AND DISPLACED STATES' POWER OVER SAFETY OF OPERATION EMPLOYEES OF INTERSTATE MOTOR CARRIERS

Appellee argues that Congress granted authority to the I.C.C. and now D.O.T. to regulate hours of service of all safety of operation employees of interstate motor carriers but as that agency has not exercised the authority with respect to mechanics, the state may fill that vacuum, assume such jurisdiction and fix maximum hours for these workers. Under Code of Federal Regulations, Title 49, Section 350-399, the D.O.T. has promulgated comprehensive Federal Motor Carrier Safety Regulations which include qualifications, operating procedures and hours of service of drivers, duties and responsibilities of mechanics, and rules for loading and protection of cargoes while in transit. Congress expressly gave the Commission "power to make the investigation and, if and when they found it necessary, to put into effect such rules and regulations as they might deem necessary." 79 Cong.Rec. 5652 (1935) The posture assumed by appellee is that anything not regulated is fair game for control by the state.

The exclusive power of the I.C.C., even though unexercised, over the qualifications and hours of these employees was reaffirmed by Congress by the enactment of the FLSA as described above. In *Southland Gasoline v. Bagley,* 319 U.S. 44, 63 S.Ct.

917 (1943), the United States Supreme Court referring to *United States v. ATA,* 310 U.S. 534, 84 L.Ed. 1345, 1350, 60 S.Ct. 1039, rejected the argument that the I.C.C. did not have the "power to" regulate the hours of the safety employees and concluded that it was unnecessary for the Commission to make a finding of a need for maximum hours for the power to exist.

The court has declared that the power, not the actual exercise of that power, is determinative of the existence of such an exception. *Levinson v. Spector Motor Service,* supra, *Morris v. McComb,* 332 U.S. 422, 68 S.Ct. 125 (1948), *City of Burbank v. Lockheed Air Terminal,* 411 U.S. 628, 93 S.Ct. 1954 (1973), *Napier v. Atlantic Coast Line R. Co.,* 272 U.S. 605, 47 S.Ct. 207 (1926).

Appellee, in both motions, relies almost totally upon the decision of this court in *H.P. Welch Co. v. New Hampshire,* 306 U.S. 79, 59 S.Ct. 438 (1939), to support its argument that the state may assume jurisdiction over the work hours of appellant's mechanics absent such regulation by the federal agency. That proceeding did not involve overtime compensation and the subject violation preceded the enactment of the FLSA on June 25, 1938 which exempted the work hours of safety of operation employees from the control of any federal, state or municipal governmental agency other than the I.C.C. as discussed above. *United States v. American Trucking Association,* supra.

## CASES CITED BY APPELLEE ARE NOT DIRECTLY RELATED OR APPLICABLE TO THE ISSUE HEREIN

The motion to dismiss or affirm filed by counsel for the appellee, Division of Labor Standards, attempts to assign significant consideration and pertinence to two District of Columbia cases, *Williams v. W.M.A. Transit Company* (D.C. Cir. 1972) 472 F.2d 1258, and *District of Columbia v. Schwerman Trucking Co.* (D.C. Cir. 1974) 327 Atl.2d 818. Neither the case law nor the legislative history supports this position. Because of the Judicial Reorganization Act (84 Stat. 473; D.C. Code 1973 Section 11-102), the *Schwerman* court declared that it had final authority to interpret a District of Columbia enactment" and that "the opinion (of the *Williams* court) does not constitute controlling precedent for this court," The opinion of the *Schwerman* court includes a comprehensive review of the history of the

District of Columbia Minimum Wage Act enacted in 1966 and amendments to the Act passed in 1970 and 1972 and its relationship to Section 204 of the MCA (49 U.S.C. 304) and Section 13(b)(1) of the FLSA (29 U.S.C. 213(b)(1)) to determine the intent of Congress relative to overtime coverage of safety employees of motor carriers employed in the District. The court concluded that Congress *deliberately* failed to exclude motor carrier personnel from overtime coverage of the D.C. Act. Id at 822. This conclusion was based upon Congress' "bodily lifting" the D.C. Act from numerous provisions of the FLSA and excepting therefrom railroad, seamen and various categories of employees included in Section 13 of the Federal Act but not excepting motor carrier personnel. Amendments to the D.C. Act in 1970 again exempted such motor carrier employees but the exemption was once again eliminated by Congress in 1973. This history described in *Schwerman* decision clearly shows that Congress was only considering and enacting legislation pertinent to the District of Columbia and was manifestly not related to the 50 states. The only reference to a state by the court is the observation that "Congress was acting only as a state legislature would in passing a minimum wage law." Id. at 825. The argument and statements in the motion filed by the Division of Labor Standards Enforcement are not supported by and in part inconsistent with the findings and language of the court in the *Schwerman* case.

*Central Delivery Service v. Burch* (D.C. Md) 355 F.Supp. 954, affirmed, 486 F.2d 1399 (1973) is an aberration that is contrary to the intent of Congress, contemporaneous decisions of the courts and recognition of the plenary power by the individual states of the federal government's jurisdiction of the work hours of motor carrier safety personnel. *Dove v. Coupe* (D.C. Cir.) 759 F.2d 167 (1985), is a suit for minimum and overtime wages based upon the District of Columbia Minimum Wage Act.

The attorney general's motion cites *Ray v. Atlantic Richfield*, 435 U.S. 151, 171-172 (1978), *Huron Cement Co. v. Detroit*, 362 U.S. 440, 443 (1960); *Service Transfer Co. v. Virginia*, 359 U.S. 171, 179 (1959); *Bethlehem Co. v. State Board*, 330 U.S. 767, 773 (1946); *Arkansas Elec. Coop. v. Ark. Public Ser. Comm'n*, 461 U.S. 375, 387-389 (1938), in support of the argument that if a federal agency is authorized to regulate and does not, a state may do so. However, these cases also hold that states may only

exercise their jurisdiction when there is an absence of a Congressional intent to establish a comprehensive, regulatory scheme which occupies the field. They further hold that when the federal agency's failure to exercise its full authority takes on the character of a ruling, state action is impermissible.

## CONCLUSION

For the reasons stated, probable jurisdiction should be noted and the judgment of the Superior Court of the State of California should be reversed.

Respectfully submitted,

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*Inc.*

Dated: September 12, 1986